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6                   **UNITED STATES DISTRICT COURT**  
7                   **DISTRICT OF NEVADA**  
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9                   RALPH SCHNEIDER,  
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11                   *Petitioner,*

12                   vs.

13                   E.K. McDANIEL, *et al.*,

14                   *Respondents.*

3:06-cv-00449-KJD-RAM

ORDER

15  
16                   This habeas matter under 28 U.S.C. § 2254 comes before the Court for a decision on  
17 the merits on the sole remaining ground, in which petitioner alleges that a mistrial was  
18 required under clearly established federal law after his co-defendant referred to his  
19 involvement with the Aryan Brotherhood, a white supremacist gang.

20                   ***Background***

21                   Petitioner Ralph Schneider seeks to set aside his 1997 Nevada state conviction,  
22 following a jury verdict, of robbery with the use of a deadly weapon, false imprisonment,  
23 battery with a deadly weapon, and battery causing substantial bodily harm.

24                   Schneider's girlfriend and co-defendant, Lisa Dehmer, sought to introduce post-arrest  
25 letters from Schneider to her that – in the midst of extensive unrelated content – referred to  
26 his affiliation with or sympathy for the Aryan Brotherhood. Dehmer sought the admission of  
27 the letters in support of a claim that she had been coerced into aiding and abetting the  
28 offenses. Schneider objected to the admission of the letters, and he further moved in limine

1 at the beginning of the trial for the exclusion of any evidence regarding affiliation with the  
 2 Aryan Brotherhood as a violation of his constitutional right of freedom of association. The  
 3 state trial court deferred a ruling until the court had an opportunity to review the letters.<sup>1</sup>

4 On a subsequent break, after having reviewed the letters, the trial court heard  
 5 additional argument. The trial court ruled that the letters could not be admitted, but the court  
 6 did so solely on the ground that the letters themselves did not contain evidence of coercion.  
 7 Petitioner does not identify any point in the trial record where the state trial court entered a  
 8 broad order prohibiting reference to the Aryan Brotherhood. The judge instead stated that  
 9 "I'm not concerned with the political affiliation." The only admonition given by the judge was  
 10 to "stay away from the letters." Petitioner, again, does not identify any point in the trial record  
 11 where the state trial court in fact imposed a blanket prohibition on references to the Aryan  
 12 Brotherhood.<sup>2</sup>

13 Dehmer's testimony on direct examination by her counsel included the following  
 14 testimony regarding why she did not follow through with an opportunity to cooperate with the  
 15 police and seek refuge in a battered woman's shelter:

16 Q Why didn't you go through with it? Here's  
 17 somebody to help you.

18 A Because I would have been considered a snitch,  
 19 and I would have been – I mean, it just – I don't –  
 he scares me.

20 Q No. [sic] You just said something. You would have  
 21 been considered a snitch. Isn't that biker babe  
 terminology, "I'd be considered a snitch"?

22 A No, sir, not biker babe. More Aryan Warriors.

23 Q What does it mean. What do they do to snitches?

24 A They kill them.

25 Q You thought that was a real threat to you?

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26 <sup>1</sup>See #24, Ex. 50 (letters); #22, Ex. 12, at 10-13 (initial argument and reservation of ruling by the state  
 27 trial court).

28 <sup>2</sup>See #22, Ex. 12, at 201-08. Assertions that the court did so are not supported by the record cited.

1 A Oh, yes, it is. I know this for a fact.

2 Q Even in the future?

3 A Yup.

4 Q There are penalties for testifying, aren't there?

5 A Your life.

6 Q There's penalties for cooperating with the police; is  
7 there not – are there not?

8 A Yes.

9 #22, Ex. 12, Part 2, at 295-96.

10 Schneider's counsel did not object to the foregoing testimony.

11 Subsequently, during cross-examination of Dehmer by Schneider's counsel, which  
12 included many contentious exchanges, the following exchange occurred:

13 Q And you felt a lot of times like Ralph [Schneider]  
14 had people watching you, right?

15 A I said sometimes that he got me to that point, but,  
16 no, I was not hallucinating, because he had friends  
that, like Wolf, okay, and Andy. Yeah.

17 Q Sounds like a heroin-induced psychosis to me.

18 A No. It's a little circle of Aryan Brotherhood. Okay.  
They stick together --

19 MR. HALL: Your Honor, I'm going to ask that --

20 THE WITNESS: And a woman --

21 MR. HALL: -- that comment be stricken from the  
record.

22 THE WITNESS: That's what they do.

23 THE COURT: I agree. That wasn't responsive, so  
just strike it.

24 MR. HALL: I'm going to ask that the jury be  
admonished to disregard that comment.

25 THE COURT: Go ahead and disregard the  
comment, please, ladies and gentlemen.

26 #22, Ex. 12, Parts 2 & 3, at 315-16.

1 Schneider moved for a mistrial at the close of all of the evidence due to Dehmer's  
 2 references to the Aryan Brotherhood or Warriors in her testimony. His counsel asserted that  
 3 the state trial court had been "very specific and very clear" that information regarding affiliation  
 4 with the Aryan Brotherhood "should not be brought in in any form." This Court notes again,  
 5 however, that petitioner does not identify the point in the trial court record where this allegedly  
 6 very specific and very clear admonition in fact was given by the state trial court. The trial  
 7 court denied the motion for a mistrial on the basis that the matter had been cured and did not  
 8 warrant the extreme measure of a mistrial.<sup>3</sup>

9 On direct appeal, the Supreme Court of Nevada rejected the claim presented to that  
 10 court on the following grounds:

11       The denial of a motion for mistrial is . . . within the district  
 12 court's sound discretion. *Smith v. State*, 110 Nev. 1094, 1102-03,  
 13 881 P.2d 649, 654 (1994). Appellant moved for a mistrial based  
 14 on evidence that connected him with a white supremacist  
 15 organization. The First Amendment prevents a state "from  
 16 employing evidence of a defendant's abstract beliefs at a  
 17 sentencing hearing when those beliefs have no bearing on the  
 18 issue being tried." *Dawson v. Delaware*, 503 U.S. 159, 168  
 19 (1992). This court has held that "admission of irrelevant evidence  
 20 of constitutionally protected First Amendment activities is also  
 21 erroneous during a trial's guilt phase, but . . . does not and should  
 22 not require automatic reversal." *Flanagan v. State*, 112 Nev.  
 1409, 1419, 930 P.2d 691, 697 (1996).

23 We conclude that no error requiring a mistrial occurred  
 24 here. First, the state did not elicit the disputed evidence or  
 25 employ it in any way. Second, the evidence consisted only of two  
 26 short remarks by the codefendant, referring to the Aryan Warriors  
 27 and the Aryan Brotherhood. The first was not even objected to,  
 28 and the district court immediately admonished the jury to  
 #23, Ex. 25, at 2-3.

#### **Governing Standard of Review**

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a "highly  
 deferential standard for evaluating state-court rulings." *Lindh v. Murphy*, 117 S.Ct. 2059,

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<sup>3</sup>#22, Ex. 12, at 391-94.

1 2066 n.7(1997). Under this deferential standard of review, a federal court may not grant  
 2 habeas relief merely on the basis that a state court decision was incorrect or erroneous. *E.g.*,  
 3 *Clark v. Murphy*, 331 F.3d 1062, 1067 (9<sup>th</sup> Cir. 2003). Instead, under 28 U.S.C. § 2254(d),  
 4 the federal court may grant habeas relief only if the decision: (1) was either contrary to or  
 5 involved an unreasonable application of clearly established law as determined by the United  
 6 States Supreme Court; or (2) was based on an unreasonable determination of the facts in  
 7 light of the evidence presented at the state court proceeding. *E.g.*, *Mitchell v. Esparza*, 540  
 8 U.S. 12, 15, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003).

9 A state court decision is “contrary to” law clearly established by the Supreme Court only  
 10 if it applies a rule that contradicts the governing law set forth in Supreme Court case law or  
 11 if the decision confronts a set of facts that are materially indistinguishable from a Supreme  
 12 Court decision and nevertheless arrives at a different result. *E.g.*, *Mitchell*, 540 U.S. at 15-16,  
 13 124 S.Ct. at 10. A state court decision is not contrary to established federal law merely  
 14 because it does not cite the Supreme Court’s opinions. *Id.* Indeed, the Supreme Court has  
 15 held that a state court need not even be aware of its precedents, so long as neither the  
 16 reasoning nor the result of its decision contradicts them. *Id.* Moreover, “[a] federal court may  
 17 not overrule a state court for simply holding a view different from its own, when the precedent  
 18 from [the Supreme] Court is, at best, ambiguous.” *Mitchell*, 540 U.S. at 16, 124 S.Ct. at 11.  
 19 For, at bottom, a decision that does not conflict with the reasoning or holdings of Supreme  
 20 Court precedent is not contrary to clearly established federal law.

21 A state court decision constitutes an “unreasonable application” of clearly established  
 22 federal law only if it is demonstrated that the court’s application of Supreme Court precedent  
 23 to the facts of the case was not only incorrect but “objectively unreasonable.” *E.g.*, *Mitchell*,  
 24 540 U.S. at 18, 124 S.Ct. at 12; *Davis v. Woodford*, 333 F.3d 982, 990 (9<sup>th</sup> Cir. 2003).

25 To the extent that the state court’s factual findings are challenged intrinsically based  
 26 upon evidence in the state court record, the “unreasonable determination of fact” clause of  
 27 Section 2254(d)(2) controls on federal habeas review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d  
 28 943, 972 (9<sup>th</sup> Cir. 2004). This clause requires that the federal courts “must be particularly

1 deferential" to state court factual determinations. *Id.* The governing standard is not satisfied  
 2 by a showing merely that the state court finding was "clearly erroneous." 393 F.3d at 973.  
 3 Rather, the AEDPA requires substantially more deference:

4 . . . [I]n concluding that a state-court finding is unsupported by  
 5 substantial evidence in the state-court record, it is not enough that  
 6 we would reverse in similar circumstances if this were an appeal  
 7 from a district court decision. Rather, we must be convinced that  
 an appellate panel, applying the normal standards of appellate  
 review, could not reasonably conclude that the finding is  
 supported by the record.

8 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9<sup>th</sup> Cir. 2004); see also *Lambert*, 393 F.3d at 972.

9 If the state court factual findings withstand intrinsic review under this deferential  
 10 standard, they then are clothed in a presumption of correctness under 28 U.S.C. § 2254(e)(1);  
 11 and they may be overturned based on new evidence offered for the first time in federal court,  
 12 if other procedural prerequisites are met, only on clear and convincing proof. 393 F.3d at 972.

13 The petitioner bears the burden of proving by a preponderance of the evidence that  
 14 he is entitled to habeas relief. *Davis*, 333 F.3d at 991.

### 15 ***Discussion***

16 In Ground 1, Schneider alleges that he was denied First and Fourteenth Amendment  
 17 rights to freedom of association, due process of law, and a fair trial when the trial court denied  
 18 the motion for mistrial based upon his co-defendant Lisa Dehmer's testimony referring to the  
 19 Aryan Brotherhood.

20 Petitioner contends that the Nevada Supreme Court's rejection of his claim was an  
 21 objectively unreasonable application of the United States Supreme Court decision in *Dawson*  
 22 *v. Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992).

23 In *Dawson*, the Supreme Court held that the First and Fourteenth Amendments prohibit  
 24 the introduction in a capital sentencing proceeding of the fact that the defendant was a  
 25 member of the Aryan Brotherhood where that evidence had no relevance to the issues being  
 26 decided in the sentencing proceeding. 503 U.S. at 160, 112 S.Ct. at 1095. Significantly, the  
 27 Court expressly rejected the broad proposition that "the Constitution forbids the consideration  
 28 in sentencing of any evidence concerning beliefs or activities that are protected under the

1 First Amendment." 503 U.S. at 164, 112 S.Ct. at 1097. The Court instead held that "the  
 2 Constitution does not erect a *per se* barrier to the admission of evidence concerning one's  
 3 beliefs and associations at sentencing simply because those beliefs and associations are  
 4 protected by the First Amendment." 503 U.S. at 165, 112 S.Ct. at 1097.

5 *Dawson* thus hinged upon the specific character of the evidence presented at the  
 6 sentencing in that case, which was distilled down exclusively to evidence of abstract beliefs  
 7 rather than relevant actions. As explained by the Court:

8                 Although we cannot accept Dawson's broad submission,  
 9 we nevertheless agree with him that, in this case, the receipt into  
 10 evidence of the stipulation regarding his membership in the Aryan  
 11 Brotherhood was constitutional error. Before the penalty hearing,  
 12 the prosecution claimed that its expert witness would show that  
 13 the Aryan Brotherhood is a white racist prison gang that is  
 14 associated with drugs and violent escape attempts at prisons, and  
 15 that advocates the murder of fellow inmates. If credible and  
 16 otherwise admissible evidence to that effect had been presented,  
 17 we would have a much different case. But, after reaching an  
 18 agreement with Dawson, the prosecution limited its proof  
 19 regarding the Aryan Brotherhood to the stipulation. The brief  
 20 stipulation proved only that an Aryan Brotherhood prison gang  
 21 originated in California in the 1960's, that it entertains white racist  
 22 beliefs, and that a separate gang in the Delaware prison system  
 23 calls itself the Aryan Brotherhood. We conclude that the  
 24 narrowness of the stipulation left the Aryan Brotherhood evidence  
 25 totally without relevance to Dawson's sentencing proceeding.  
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28                 Even if the Delaware group to which Dawson allegedly  
 1 belongs is racist, those beliefs, so far as we can determine, had  
 2 no relevance to the sentencing proceeding in this case. For  
 3 example, the Aryan Brotherhood evidence was not tied in any  
 4 way to the murder of Dawson's victim. . . .

5                 Because the prosecution did not prove that the Aryan  
 6 Brotherhood had committed any unlawful or violent acts, or had  
 7 even endorsed such acts, the Aryan Brotherhood evidence was  
 8 also not relevant to help prove any aggravating circumstance. In  
 9 many cases, for example, associational evidence might serve a  
 10 legitimate purpose in showing that a defendant represents a  
 11 future danger to society. A defendant's membership in an  
 12 organization that endorses the killing of any identifiable group, for  
 13 example, might be relevant to a jury's inquiry into whether the  
 14 defendant will be dangerous in the future. Other evidence  
 15 concerning a defendant's associations might be relevant in  
 16 proving other aggravating circumstances. But the inference which  
 17 the jury was invited to draw in this case tended to prove nothing

1 more than the abstract beliefs of the Delaware chapter. . . . .  
 2 Whatever label is given to the evidence presented . . . we  
 3 conclude that Dawson's First Amendment rights were violated by  
 4 the admission of the Aryan Brotherhood evidence in this case,  
 5 because the evidence proved nothing more than Dawson's  
 6 abstract beliefs. . . . Delaware might have avoided this problem  
 7 if it had presented evidence showing more than mere abstract  
 beliefs on Dawson's part, but on the present record one is left  
 with the feeling that the Aryan Brotherhood evidence was  
 employed simply because the jury would find these beliefs  
 morally reprehensible. Because Delaware failed to do more, we  
 cannot find the evidence was properly admitted as relevant  
 character evidence.

8 . . . [The First Amendment] prohibits the State from  
 9 requiring information from an organization that would impinge on  
 10 First Amendment associational rights if there is no connection  
 11 between the information sought and the State's interest. . . . We  
 think that it similarly prevents Delaware here from employing  
 evidence of a defendant's abstract beliefs at a sentencing hearing  
 when those beliefs have no bearing on the issue being tried.

12 503 U.S. at 165-68, 112 S.Ct. at 1097-99.

13 The Supreme Court further left the issue of harmless error for the lower court on  
 14 remand. 503 U.S. at 168-69, 112 S.Ct. at 1099.

15 In the present case, the parties debate whether the Nevada Supreme Court's decision  
 16 in this case can be contrary to or an unreasonable application of *Dawson* due to the fact that  
 17 *Dawson* arose in the context of the penalty phase proceeding rather than a trial on guilt or  
 18 innocence. Respondents urge that the United States Supreme Court to date has not  
 19 extended *Dawson* to the latter context.

20 While perhaps of academic interest,<sup>4</sup> the resolution of the present case in truth does  
 21 not turn upon this debate. The relevant bases for the state supreme court's rejection of  
 22 Schneider's claim were, first, an express holding that, where applicable, *Dawson* does not  
 23 require automatic reversal whenever references to gang affiliation are made, and, second,  
 24 an implicit holding that *Dawson* did not require reversal on the facts presented.

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 26 <sup>4</sup>On the one hand, petitioner's burden is to demonstrate that the state court decision is contrary to or  
 27 an unreasonable application of clearly established federal law as determined by the United States Supreme  
 28 Court, not decisions of lower federal and state courts expanding upon Supreme Court precedent. On the  
 other hand, the Supreme Court of Nevada in this case did not reject the claim on the basis that *Dawson*  
 applies only to penalty phase proceedings.

1       Neither of these holdings constituted an objectively unreasonable application of  
 2 *Dawson*.

3       First, the express holding that *Dawson* does not require automatic reversal was not an  
 4 objectively unreasonable application of the decision. At the outset, *Dawson* clearly holds that  
 5 the Constitution does not erect a *per se* barrier to references to gang affiliation. The Supreme  
 6 Court expressly held that the Constitution does not do so. Moreover, the Supreme Court  
 7 further did not rule out application of the harmless error analysis when error is present.

8       Second, the holding that *Dawson* did not require a mistrial on the facts presented also  
 9 was not an objectively unreasonable application of the decision. Indeed, it is debatable  
 10 whether Dehmer's testimony gave rise to error under *Dawson* in the first instance. What  
 11 *Dawson* prohibits is introduction of evidence of only abstract beliefs having no relevance to  
 12 any issue in the case. Dehmer instead was referring in her first statement to the alleged  
 13 practices, not the beliefs, of the Aryan Brotherhood as it related to her actions and inactions.  
 14 And her second statement, which was stricken, similarly referred to actions rather than beliefs  
 15 of the group. A different issue, perhaps, might have been presented if the evidence had been  
 16 admitted by the State over objection. However, the Nevada Supreme Court's conclusion in  
 17 the present case that *Dawson* – which concerned evidence going strictly and exclusively to  
 18 the abstract beliefs rather than the actions of an organization, without any other relevance –  
 19 did not require reversal in the circumstances presented was not an objectively unreasonable  
 20 application of the United States Supreme Court precedent.<sup>5</sup>

21       Ground 1 therefore does not provide a basis for federal habeas relief.<sup>6</sup>  
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23       <sup>5</sup>Petitioner's reliance on federal circuit cases is misplaced. His burden under the AEDPA is to  
 24 demonstrate that the state supreme court's decision was an unreasonable application of clearly established  
 25 federal law as determined by the *United States Supreme Court*. The cases in any event are distinguishable.

26       <sup>6</sup>Petitioner requests an evidentiary hearing on the claim. Petitioner does not explain how the claim  
 27 lends itself to an evidentiary hearing. Ground 1 is a claim of trial error based upon the failure of the state  
 28 district court to grant a mistrial based upon what Lisa Dehmer said at trial. Her statements in the record  
 either were a basis for a mistrial or they were not. Moreover, petitioner has not demonstrated satisfaction of  
 the requirements for a federal evidentiary hearing under 28 U.S.C. § 2254(e)(2). This was a direct appeal  
 claim in the state courts, and petitioner was represented by counsel both at trial and on appeal. He provides  
 (continued...)

1 IT THEREFORE IS ORDERED that the remaining claim in the petition for a writ of  
2 habeas corpus shall be DENIED on the merits and that this action shall be DISMISSED with  
3 prejudice.

4 The Clerk of Court shall enter final judgment accordingly, in favor of respondents and  
5 against petitioner, dismissing this action with prejudice.

6 DATED: July 8, 2009

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9 KENT J. DAWSON  
10 United States District Judge

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28 <sup>6</sup>(...continued)  
no explanation for the failure to develop any further factual basis for the claim of trial error in the state courts.